

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

WILLOW LAKE GAS PLANT
(CRESTWOOD, NEW MEXICO) FOR AN AIR QUALITY PERMIT,
NO. 5142-M8

AQB 21-38

**WILDEARTH GUARDIANS' ERRATA TO CLOSING ARGUMENT AND
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At the direction of the Hearing Officer, WildEarth Guardians files this Errata to its Closing Argument and Findings of Fact and Conclusions of Law that was filed in this matter on December 1, 2021. This Errata is being filed and served to translate the citations in Guardians' Closing Argument into its Proposed Findings of Fact and Conclusions of Law.

The corrections are identified below in red:

Page 14

1. The Applicant, Crestwood New Mexico Pipeline LLC, filed Application 5142M8 with the Department on February 19, 2021. **NMED Amended Exh. 25 at 2.**
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Willow Lake Gas Plant by 29 tpy of nitrogen oxides and 23 tpy of volatile organic compounds, among other pollutants. **21-38_AR350.**
3. The Department initially published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on March 20, 2021, but it subsequently published a revised version of the legal notice in the Carlsbad Current Argus on April 22, 2021, which included instructions for how the public could submit comments electronically. **NMED Amended Exh. 25 at 5-6.**
4. The Department initiated a new 30-day comment period starting on April 22, 2021. **Id. at 6.**
5. Guardians submitted a timely public comment letter on April 16, 2021, raising issues of concern and requesting a public hearing. **21-38_AR500-503.**
6. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit on May 28, 2021, initiating the second public comment period. **NMED Amended Exh. 25 at 6.**

7. Guardians submitted a second set of timely public comments on June 28, 2021, renewing the concerns it raised in its first comment letter, raising new concerns, and requesting a public hearing. [21-38_AR504-509](#).

Page 15

8. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1, 2021 Cabinet Secretary James Kenney granted a public hearing for Crestwood's Application 5142M8. [New Mexico Environment Department, Public Hearing Request Determination for WEG Related Permit Applications \(Jun. 1, 2021\)](#).
9. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-38. [Notice Hearing and Appointment of Hearing Officer, AQB 21-38 \(Jun. 24, 2021\)](#).
10. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-38 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits. [Scheduling Order, AQB 21-31 et al. \(Jul. 20, 2021\)](#).
11. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing. [Order Amending Scheduling Order, AQB 21-31 et al. \(Aug. 6, 2021\)](#).
12. Crestwood revised its permit application and submitted the updated version to the Department on September 14, 2021, which added a new VRU and increased the throughput of the tanks and truck loading. [NMED Amended Exh. 25 at 5](#).

Page 16

13. The Department sent the revised draft permit to Guardians on September 21, 2021. [Id. at 7](#).
15. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties. [Joint Motion in Limine, AQB 21-31 et al. \(Oct. 12, 2021\)](#).

16. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant. *Day 1 Transcript at 40, 61-63.*

Page 17

19. The proposed permit includes a limit restricting venting emissions as a result of startup, shutdown, maintenance and malfunction to 10 tons per year of VOCs and 1 tpy of H₂S. *21-38_AR477-481.*
20. To ensure compliance with the SSM/M emission limit, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM/M events. *Id. at 478-480.*
21. The method for measuring the volume of gas vented during SSM/M events is not included in the draft permit. *See id. at 477-481; see also Day 2 Transcript at 370.*
22. The Department testified that it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. *NMED Amended Exh. 25 at 15.*
23. NMED Policy 07-13 is the Department's policy regarding public participation. *See New Mexico Environment Department, Policy 07-13: Public Participation (Feb. 6, 2018).*
24. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056. *Id.*

Page 18

26. The Record Proper and any part thereof shall be evidence. *20.1.4.400B.(3) NMAC.*
27. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. *20.1.4.7A.(19) NMAC.*
28. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. *Id. at (2).*

29. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. *20.1.4.400A.(1) NMAC.*
30. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id.*
31. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id.*
32. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. *See NMSA 1978, § 74-2-9.C.*
33. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 133 N.M. 97, 104.

Page 20

36. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable. *See U.S. EPA, Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits* (Jan. 25, 1995) at 5.
37. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting. *Id.* at 6.
39. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application. *NMSA 1978, § 74-2-7.C(1)(a).*

Respectfully submitted this 17th day of December, 2021,

/s/ Matthew A. Nykiel
Matthew A. Nykiel
WildEarth Guardians
3798 Marshall St., Ste. 8
Wheat Ridge, CO 80033
mnykiel@wildearthguardians.org

Attorney for WildEarth Guardians

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing **ERRATA** was served on December 17, 2021 via email to the persons listed below:

Pamela Jones
Madai Corral
Hearing Clerk
New Mexico Environment Department
PO Box 5469
Santa Fe, NM 87502
madai.corral@state.nm.us
pamela.jones@state.nm.us

Chris Vigil
Office of General Counsel
New Mexico Environment Department
121 Tijeras Avenue, Suite 1000
Albuquerque, NM 87102
christopherj.vigil@state.nm.us

Attorney for New Mexico Environment Dept.

Courtney M. Shephard
Eric P. Waeckerlin
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth St., Ste. 2200
Denver, CO 80202
cshephard@bhfs.com
ewaeckerlin@bhfs.com

Attorneys for Crestwood New Mexico Pipeline LLC

/s Matthew A. Nykiel
Matthew A. Nykiel